

191138

STATE OF SOUTH CAROLINA

(Caption of Case)

Application of Utilities Services of
S C for adjustment of Rates and
charges and modification to certain
terms and conditions for provision
of water and sewer
Petition for Rehearing or
Reconsideration

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

COVER SHEET

DOCKET

NUMBER: 2007 - 286 - WS

(Please type or print)

Submitted by: Ben Mustian

Address: 930 Richland
Columbia SC

SC Bar Number:

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Fax:

Other:

Email:

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for use by the Public Service Commission of South Carolina for the purpose of docketing and must be filled out completely.

DOCKETING INFORMATION (Check all that apply)

☐ Emergency Relief demanded in petition☐ Request for item to be placed on Commission's Agenda expeditiously☐ Other:

| INDUSTRY (Check one) | NATURE OF ACTION (Check all that apply) | | | |
|--|--|--|--|--|
| <input type="checkbox"/> Electric | <input type="checkbox"/> Affidavit | <input type="checkbox"/> Letter | <input type="checkbox"/> Request | |
| <input type="checkbox"/> Electric/Gas | <input type="checkbox"/> Agreement | <input type="checkbox"/> Memorandum | <input type="checkbox"/> Request for Certification | |
| <input type="checkbox"/> Electric/Telecommunications | <input type="checkbox"/> Answer | <input type="checkbox"/> Motion | <input type="checkbox"/> Request for Investigation | |
| <input type="checkbox"/> Electric/Water | <input type="checkbox"/> Appellate Review | <input type="checkbox"/> Objection | <input type="checkbox"/> Resale Agreement | |
| <input type="checkbox"/> Electric/Water/Telecom. | <input checked="" type="checkbox"/> Application | <input type="checkbox"/> Petition | <input type="checkbox"/> Resale Amendment | |
| <input type="checkbox"/> Electric/Water/Sewer | <input type="checkbox"/> Brief | <input checked="" type="checkbox"/> Petition for Reconsideration | <input type="checkbox"/> Reservation Letter | |
| <input type="checkbox"/> Gas | <input type="checkbox"/> Certificate | <input type="checkbox"/> Petition for Rulemaking | <input type="checkbox"/> Response | |
| <input type="checkbox"/> Railroad | <input type="checkbox"/> Comments | <input type="checkbox"/> Petition for Rule to Show Cause | <input type="checkbox"/> Response to Discovery | |
| <input type="checkbox"/> Sewer | <input type="checkbox"/> Complaint | <input type="checkbox"/> Petition to Intervene | <input type="checkbox"/> Return to Petition | |
| <input type="checkbox"/> Telecommunications | <input type="checkbox"/> Consent Order | <input type="checkbox"/> Petition to Intervene Out of Time | <input type="checkbox"/> Stipulation | |
| <input type="checkbox"/> Transportation | <input type="checkbox"/> Discovery | <input type="checkbox"/> Prefiled Testimony | <input type="checkbox"/> Subpoena | |
| <input type="checkbox"/> Water | <input type="checkbox"/> Exhibit | <input type="checkbox"/> Promotion | <input type="checkbox"/> Tariff | |
| <input checked="" type="checkbox"/> Water/Sewer | <input type="checkbox"/> Expedited Consideration | <input type="checkbox"/> Proposed Order | <input type="checkbox"/> Other: _____ | |
| <input type="checkbox"/> Administrative Matter | <input type="checkbox"/> Interconnection Agreement | <input type="checkbox"/> Protest | | |
| <input type="checkbox"/> Other: _____ | <input type="checkbox"/> Interconnection Amendment | <input type="checkbox"/> Publisher's Affidavit | | |
| | <input type="checkbox"/> Late-Filed Exhibit | <input type="checkbox"/> Report | | |

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SPECIAL COUNSEL

March 3, 2008

*ALSO ADMITTED IN TX

VIA HAND-DELIVERY

The Honorable Charles L.A. Terreni
Chief Clerk/Administrator

Public Service Commission of South Carolina

101 Executive Center Drive
Columbia, South Carolina 29210

RECEIVED
2008 MAR -3 PM 4:35
SC PUBLIC SERVICE
COMMISSION

RE Application of Utilities Services of South Carolina, Inc. for adjustment of rates and charges and modifications to certain terms and conditions for the provision of water and sewer service; Docket No. 2007-286-WS

Dear Mr. Terreni:

Enclosed for filing please find the original and two (2) copies of Utilities Services of South Carolina, Inc.'s Petition for Rehearing or Reconsideration in the above-referenced matter.

I would appreciate your acknowledging receipt of this document by date-stamping the extra copy that is enclosed and returning it to me via our courier delivering same. By copy of this letter, I am serving all parties of record and enclose my certificate of service to that effect. If you have any questions, or need additional information, please do not hesitate to contact us.

Sincerely,

Willoughby & Hoefer, P.A.



Benjamin P. Mustian

BPM/kwk

cc: Jeffrey M. Nelson, Esquire (via U.S. Mail first class)

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2007-286-WS

RECEIVED
2008 MAR -3 PM 1:35
SOUTH CAROLINA
PUBLIC SERVICE
COMMISSION

IN RE:

Application of Utilities Services of South
Carolina, Inc. for adjustment of rates and
charges and modifications to certain terms
and conditions for the provision of water
and sewer service.

**PETITION FOR REHEARING OR
RECONSIDERATION**

Utilities Services of South Carolina, Inc. ("USSC" or "Company") pursuant to S.C. Code Ann. § 58-5-330 (Supp. 2007), 26 S.C. Code Ann. Regs. 103-854 (Supp. 2007), and other applicable provisions of law and regulation, submits this petition for rehearing or reconsideration of Order No. 2008-96 ("Order") in the above-captioned matter, and in support thereof would respectfully show as follows:

1. On August 6, 2007, USSC filed an Application seeking approval of a new schedule of rates and charges for water and sewer services it provides to customers in South Carolina. The Application sought an increase in annual service revenues of \$1,398,025.

2. After holding two "local public hearings" on November 5, 2007 and November 7, 2007, and a "public" hearing on December 13, 2007, the Commission issued the Order, dated February 11, 2008, in which it denied and dismissed USSC's application. Service of the Order was made upon counsel for USSC by certified mail on February 12, 2008.

3. USSC submits that the Order prejudices its substantial rights because certain findings, inferences, conclusions, and decisions made therein are erroneous, unsupported by

substantial evidence, arbitrary and capricious, characterized by abuse of discretion, in violation of constitutional or statutory provisions, made upon unlawful procedure, or affected by other errors of law or fact, as set forth herein.

4. The Order concludes that USSC failed to meet its burden of proof with respect to the capital improvements and plant investments claimed by USSC to have been made since its last rate case. *See, e.g.*, Order at pp. 4, 11-13, and 20-22. This conclusion is erroneous because USSC met its burden of production in this regard, there is independent, corroborative evidence from the state agency charged with the duty of auditing USSC's books and records in this regard (utilizing the public interest standard provided for under S.C. Code Ann. §58-4-10 (Supp. 2007)), and there is absolutely no evidence of record that USSC has not made the capital improvements and plant investments claimed. USSC presented testimony demonstrating that it had invested millions of dollars in plant additions and capital improvements for both its water and sewer systems since its last rate case and had a rate base of approximately \$9,700,000. [Tr.p. 163, l.21 - p.164, l.15; p. 166, ll. 4-16, p. 167, ll. 3-8; p.168, ll. 16-19.] In addition, the Office of Regulatory Staff's audit and testimony entered into the record of this case demonstrated that USSC had a rate base of \$9,141,816. [Tr.p.293, l.13; Hearing Exhibit 11, p. 1]. No witness in the case disputed that the Company had made these significant investments since its last rate case or had a rate base of over \$9 Million and the Order cites to no testimony or evidence of record to that effect. The Order improperly relies upon testimony of only six water customers (out of more than six thousand eight hundred) in only four subdivisions with water service (out of eighty two) complaining about water service or quality to reach this conclusion. Order at 12-13. The Order criticizes Company witness Bruce T. Haas because he could not identify any capital

improvements made by the Company in the Plantation Subdivision. *Id.* The Order states that this testimony led the Commission to have “questions as to where the capital improvements ... testified to by the Company witness were implemented” and to conclude that it “was not able ... to find that USSC made **all** of the capital improvements alleged.” *Id.* (Emphasis supplied.) This portion of the Order is also erroneous for the following reasons:

a. The reliance upon the cited customer testimony and testimony of Company witness Haas to deny USSC the benefit of its plant investments made since its last rate case is not substantial evidence. No reasonable mind could conclude that any portion of the capital improvements claimed – much less all of them – had not been made simply because certain customers have water service quality complaints or because improvements may not have been made in a given subdivision. *See Hamm v. S.C. Public Service Commission*, 315 S.C. 119, 432 S.E.2d 454 (1993); *see also Heater of Seabrook, Inc. v. PSC*, 324 S.C. 56, 478 S.E.2d 826 (1996) (*Heater I*). At most, the testimony of this *de minimis* number of customers and Company witness Haas might indicate that no capital improvements had been made in the water systems serving the subdivisions **where these customers reside**. Stated another way, the absence of a capital improvement in a given subdivision is no basis upon which to deny recognition in rate base of capital improvements that were made in other subdivisions and the Order therefore improperly denies USSC a fair return on its investment, as is constitutionally required (see subparagraph c below).

b. The Order is an arbitrary departure from the Commission’s prior precedents involving other water and sewer utilities within the Commission’s jurisdiction – including USSC. *See Heater I, supra*. *See also 330 Concord Neighborhood Ass’n v. Campsen*, 309 S.C. 514, 424 S.E.2d 538, (Ct. App. 1992). For example, in Docket No. 2005-217-WS, the Commission heard testimony from customers complaining about water service quality by USSC, including testimony of Linda Hogan Fick – a customer testifying in the instant case. Notwithstanding this testimony, the Commission approved a rate increase in Order No. 2006-22, based in part upon additions to the Company’s rate base testified to by both Company and ORS witnesses. Similarly, in Order No. 2007-887, Docket No. 2007-244-W, the Commission approved an increase in rates for Southland Utilities, Inc. based upon that company’s allowable rate base, as agreed to by ORS, notwithstanding the fact that two (2) customers in that proceeding complained about receiving “boil water” advisories from that company. Also, in Order No. 2005-328 in Docket No. 2004-357-W/S, the Commission granted rate relief to Carolina Water Service, Inc. and in so doing recognized additions to that company’s rate base testified to by both utility and ORS witnesses notwithstanding customer complaints about water service quality in that case. And, in Order No. 2006-582, Docket No. 2006-97-WS, this Commission approved a

settlement agreement between Tega Cay Water Service, Inc. and ORS which provided for a rate increase based upon increases in that utility's rate base, again notwithstanding customer complaints regarding service and quality.

c. The Order unconstitutionally denies USSC a fair return on its investment. The undisputed evidence of record is that USSC has added \$1,507,580 in rate base since its last rate case. USSC is entitled to include that amount in its rate base upon which it "is **entitled** to an opportunity to earn a fair and reasonable return." See *Porter v. S.C. Public Service Comm'n*, 333 S.C.12, 24, 507 S.E.2d 328, 334, n.4, citing *Southern Bell Tel. & Tel. Co. v. PSC*, 270 S.C. 590, 244 S.E.2d 278 (1978) (emphasis supplied). Also see *Bluefield Waterworks v. West Virginia*, 262 U.S. 679 (1923) and *Federal Power Commission v. Hope Natural Gas*, 320 U.S. 591 (1944).

d. The Order is arbitrary and capricious, constitutes an abuse of discretion, and is erroneous as a matter of law because it withholds all rate relief in all of the eighty two subdivisions receiving water and the four subdivisions receiving sewer from USSC. Even assuming that the limited, unsubstantiated customer testimony regarding service quality is properly considered, which is disputed, the determination to deny all rate relief on that basis exceeds that which would be necessary to address the putative quality of service concerns. Cf. *Patton v. Public Service Commission*, 280 S.C. 288, 312 S.E.2d 257 (1984) (affirming the Commission's delay in the implementation of approved rate relief in one subdivision served by a sewer utility on the ground that customer testimony, substantiated by DHEC testimony, demonstrated that plant upgrades in that specific subdivision were required to address poor quality of service.)

e. The Order is erroneous as a matter of law because it ignores the orders of the Court of Common Pleas for Richland County reversing the Commission for relying upon unsubstantiated customer testimony regarding service quality issues as a basis to deny rate relief or to impose requirements upon the utility exceeding Commission authority to do so. See *Tega Cay Water Service, Inc. v. SCPSC*, C/A No. 97-CP-40-0923 (September 25, 1998) and *Carolina Water Service, Inc. v. South Carolina Office of Regulatory Staff*, C/A No. 2005-CP-40-6133.

f. The Order is arbitrary and capricious, constitutes an abuse of discretion, and is erroneous as a matter of law because it is contrary to the holding of the Supreme Court of South Carolina in *August Kohn v. Public Serv. Comm'n*, 281 S.C. 28, 313 S.E.2d 630 (1984). There, the Supreme Court held that rates for a public utility are properly set on a statewide basis and a specific subdivision may have its rates set separately only where special facts and circumstances exist. Assuming that such special facts or circumstances exist in the instant case (which is disputed), the proper means by which to address same would have been to exclude from a rate increase only those subdivisions in which special facts and circumstances existed. By contrast, the Order withholds all rate relief in all of

the eighty two subdivisions receiving water and the four subdivisions receiving sewer [Tr.p. 204, ll. 20-22] from USSC. *See, also, Patton, supra.*

g. The Order is erroneous as a matter of law because it ignores the investigation, audit, examination and testimony of ORS which concluded that USSC had in fact made the additions to plant proposed to be included in the Company's rate base in the parties' proposed orders. *See Johnson v. Painter*, 279 S.C. 390, 307 S.E.2d 860 (1983).

h. The Order results in a confiscatory rate of return on rate base because it effectively allows USSC a return of only 2.58% on property used and useful in providing service to customers in South Carolina. *See Bluefield, Hope supra.*

i. Even assuming the customer testimony bears on the level of the Company's plant investment and rate base, which is disputed, the Order erroneously concludes that "the testimony of the public witnesses taken as a whole calls the Company testimony into question." *Id.* at 13. In view of the size of the Company's customer base, USSC submits that the level of customer testimony complaining about service quality referenced in the Order – less than 1/10th of 1% – is not substantial evidence. *See Heater Utilities, Inc. v. Public Service Commission of South Carolina*, Op. No. 95-MO-365 (S.C.S.Ct. Filed December 8, 1995) (*Heater Memo. Op.*) *See also Porter v. S.C. Public Service Comm'n*, 328 S.C. 222, 493 S.E.2d 92 (1997) (holding that a variance in expenses of approximately .3% not material to determination of the Company's allowable rate base). Moreover, not all of these customers testified regarding quality of service issues, with most confining their comments to concerns over rates. Some of the customers stated that they either had experienced no problems with the Company's service or had noticed an improvement in service. Furthermore, ORS concluded that USSC provides adequate service. [Tr.p. 309, l. 14-15, p.310, ll. 2-7.] USSC submits that the foregoing clearly demonstrates why the Commission cannot properly rely upon the very limited evidence of the type cited in the Order as it is not such as would permit a reasonable person to form a conclusion with respect to the Company's overall service quality.

j. Even assuming that the Commission could properly rely upon customer testimony, which is disputed, the Order erroneously denies USSC's request to include in rate base additions to sewer plant given that no customer raised any issue with respect to sewer service.

5. The Order appears¹ to conclude that USSC failed to meet its burden of proof with respect to increases in operational expenses claimed by USSC to have been incurred since its last rate case. *See, e.g.*, Order at pp. 11-13, and 20-22. This is erroneous because USSC met its burden of production in this regard, there is independent, corroborative evidence from the state agency charged with the duty of auditing USSC's books and records in this regard (utilizing the public interest standard provided for under S.C. Code Ann. §58-4-10 (Supp. 2007)), and there is absolutely no evidence of record that USSC has not made the expenditures claimed. USSC's accounting witness testified that the Company had experienced an increase in expenses of \$600,000 for both its water and sewer systems since its last rate case. [Tr.p.166, l.21 - p. 167, l.2]. In addition, the Office of Regulatory Staff's audit and testimony entered into the record of this case demonstrated that USSC had incurred \$2,766,758² in expenses on an as adjusted basis. [Tr.p.278, l.18]. In Order No. 2006-22, Docket No. 2005-217-WS, January 19, 2006, the Commission found that the Company's operating expenses in its last rate case were \$2,269,000. No witness in the case disputed that the Company had incurred additional expenses since its last rate case and the Order cites to no testimony or evidence of record to that effect. The Order

¹The subsection of the Order in which the Commission discusses its conclusion that USSC failed to meet its burden of proof with respect to expenses associated with its main testing and flushing program, use of sequestering agents and annual main cleaning programs is entitled "Capital Improvements". However, none of these expenditures are capital improvements and USSC assumes for the purposes of this petition that the expenditures are being treated by the Commission as operating expenses.

²At the hearing, ORS Witness Paul Townes informed the Commission that he was willing to audit additional documentation submitted by USSC regarding proposed rate case expenses. [Tr. p. 296, l. 13 – p. 298, l. 2]. The Commission allowed ORS Witness Townes to submit an affidavit as a late-filed exhibit demonstrating that the Company had incurred rate case expenses totaling \$184,300. [Hearing Exhibit No. 12]. The inclusion of these audited and verified expenses demonstrate that USSC's total operating expenses amount to \$2,791,193.

erroneously relies upon testimony of only six (out of more than six thousand eight hundred) water customers in only four (out of eighty two) subdivisions with water service complaining about water service or quality to reach this conclusion. Order at 12-13. The Order criticizes Company witness Bruce T. Haas because he “rarely indicated where ... on-going operational programs have been instituted” and could not identify “operational programs [which] have been employed in the Plantation subdivision.” *Id.* The Order states that this testimony led the Commission to have “questions as to where ... on-going operational programs testified to by the Company witness were implemented and whether they are effective” and to conclude that it “was not able ... to find that USSC ... performed **all** of the operational programs that it alleges for ratemaking purposes.” *Id.* (Emphasis supplied.) This portion of the Order is also erroneous for the following reasons:

a. The reliance upon the cited customer testimony and testimony of Company witness Haas to deny USSC the benefit of its increased operational expenses since its last rate case is not substantial evidence. No reasonable mind could conclude that any portion of the additional operating expenses claimed – much less all of them – had not been incurred simply because certain customers have water quality complaints or because improvements may not have been made in a given subdivision. *See Hamm v. S.C. Public Service Commission, supra; see also Heater I, supra.* At most, the testimony of this *de minimis* number of customers and Company witness Haas might indicate that no part of the increased operational expenses had been made in the water systems serving the subdivisions **where these customers reside**. Stated another way, the absence of an operational expense in a given subdivision is no basis upon which to deny recognition of operational expenses that were made in other subdivisions and the Order therefore improperly denies USSC an opportunity to recover its expenses of operation, as is required by law. (see subparagraph c below).

b. The Order is an arbitrary departure from the Commission’s prior precedents involving other water and sewer utilities within the Commission’s jurisdiction – including USSC. *See Heater I, supra. See also 330 Concord Neighborhood Ass’n v. Campsen, supra.* For example, in Docket No. 2005-217-WS, the Commission heard testimony from customers complaining about water service and quality by USSC, including testimony of Linda Hogan Fick – a customer testifying in the instant case. Notwithstanding this testimony,

the Commission approved a rate increase Order No. 2006-22, based in part upon increases in the Company's expenses testified to by both Company and ORS witnesses. Similarly, in Order No. 2007-887, Docket No. 2007-244-W, the Commission approved an increase in rates for Southland Utilities, Inc. based upon that company's increased operating expenses, as agreed to by ORS, notwithstanding the fact that two (2) customers in that proceeding complained about receiving "boil water" advisories from that company. Also, in Order No. 2005-328 in Docket No. 2004-357-W/S, the Commission granted rate relief to Carolina Water Service, Inc. and in so doing recognized additional expenses testified to by both utility and ORS witnesses notwithstanding customer complaints about water service quality in that case. And, in Order No. 2006-582, Docket No. 2006-97-WS, this Commission approved a settlement agreement between Tega Cay Water Service, Inc. and ORS which provided for a rate increase based upon increases in that utility's expenses, again notwithstanding customer complaints regarding service quality.

c. The Order erroneously concludes that USSC did not meet its burden of proof with respect to expenditures for operational programs because the company's expenses are presumed reasonable and incurred in good faith as a matter of law and no **party** in the case raised the specter of imprudence. The Order is therefore contrary to the holding of the Supreme Court in *Hamm v. S.C. Public Service Com'n, supra*. To the contrary, if the non-party customer witness testimony relied upon in the Order supports any conclusion regarding the Company's operating expenses (which is disputed), it is the conclusion that no additional operating expenses were incurred with respect to the specific water systems serving the subdivisions where they reside. This certainly does not constitute a "tenable basis for raising the specter of imprudence" with respect to the additional expenses that were made as shown by the undisputed evidence of record.

d. The Order is arbitrary and capricious, constitutes an abuse of discretion, and is erroneous as a matter of law because it withholds all rate relief in all of the eighty two subdivisions receiving water and the four subdivisions receiving sewer from USSC. Even assuming that the limited, unsubstantiated customer testimony regarding service quality is properly considered, which is disputed, the determination to deny all rate relief on that basis exceeds that which would be necessary to address the putative quality of service concerns. *Cf. Patton v. Public Service Commission, supra*.³

e. The Order is erroneous as a matter of law because it ignores the orders of the Court of Common Pleas for Richland County reversing the Commission for relying upon unsubstantiated customer testimony regarding service quality issues as a basis to deny

³The Order also ignores the testimony of Company witness Haas responding to the complaints of poor water quality and the testimony of ORS witness Morgan with respect to the quality of the Company's water. [Tr. p. 219, l. 19 – p. 221, l. 10; p. 228, l. 4-18; p. 256, l. 20 – p. 260, l. 4; p. 309, l. 15-16; p. 323, l. 25 – p. 324, l. 2; Hearing Exhibit 13, p. 2]

rate relief or to impose requirements upon the utility exceeding Commission authority to do so. See Tega Cay Water Service, Inc. v. SCPSC, supra and Carolina Water Service, Inc. v. South Carolina Office of Regulatory Staff, supra.

f. The Order is arbitrary and capricious, constitutes an abuse of discretion, and is erroneous as a matter of law because it is contrary to the holding of the Supreme Court of South Carolina in *August Kohn v. Public Serv. Comm'n*, 281 S.C. 28, 313 S.E.2d 630 (1984). There, the Supreme Court held that rates for a public utility are properly set on a statewide basis and a specific subdivision may have its rates set separately only where special facts and circumstances exist. Assuming that such special facts or circumstances exist in the instant case (which is disputed), the proper means by which to address same would have been to exclude from a rate increase only those subdivisions in which special facts and circumstances existed. By contrast, the Order withholds all rate relief in all of the eighty two subdivisions receiving water and the four subdivisions receiving sewer from USSC. *See, also, Patton, supra*.

g. The Order is erroneous as a matter of law because it ignores the investigation, audit, examination and testimony of ORS. *See Johnson v. Painter, supra*.

h. The Order improperly denies USSC an opportunity to recover its expenses of doing business. *See Hamm v. PSC*, 310 S.C.13, 425 S.E.2d 28 (1993) *citing Southern Bell v. S.C. PSC*, 270 S.C. 590, 244 S.E.2d 278 (1978).

i. Even assuming the customer testimony bears on the issue of the company's allowable expenses, which is disputed, the Order erroneously concludes that "the testimony of the public witnesses taken as a whole calls the Company testimony into question." *Id.* at 13. In view of the size of the Company's customer base, USSC submits that the level of customer testimony complaining about service quality referenced in the Order – less than 1/10th of 1% – is not substantial evidence. *See Heater Memo. Op., supra*. *See also Porter v. S.C. Public Service Comm'n, supra*. Moreover, not all of these customers testified regarding quality of service issues, with most confining their comments to concerns over rates. Some of the customers stated that they either had experienced no problems with the Company's service or had noticed an improvement in service. Furthermore, ORS concluded that USSC provides adequate service. USSC submits that the foregoing clearly demonstrates why the Commission cannot properly rely upon the very limited evidence of the type cited in the Order as it is not such as would permit a reasonable person to form a conclusion with respect to the Company's overall quality of service and customer service.

j. Even assuming that the Commission could properly rely upon customer testimony, which is disputed, the Order erroneously denies USSC's request to allow increased expenses related to its provision of sewer service given that no customer raised any issue with respect to sewer service.

6. The Order erroneously concludes that USSC failed to meet its burden of proof with respect to expenses incurred with its affiliate, Bio-Tech, Inc., for sludge hauling services. Contrary to the Order, there is not “an absence of data or information from which the reasonableness and propriety of the services rendered and the reasonable cost of rendering such service **can** be ascertained” in this case. Order at 14 (emphasis supplied). This is so because the Company provided evidence from which the reasonableness and propriety of this expense **can** be ascertained in the form of the testimony of its witness Georgiev, who stated that the rates charged to USSC by Bio-Tech were the same as those charged by Bio-Tech to other public utilities and governmental utilities for the same services and were market rates. [Tr. p.169 l.14 - p.170. l.16.] USSC submits that this is clearly information from which the reasonableness and propriety of the expenses **can** be ascertained, which is all that USSC is required to produce under *Hilton Head Plantation Utilities, Inc. v. PSC*, 312 S.C. 448, 441 S.E.2d 321 (1994). In addition, the accounting testimony and audit report of ORS entered into the record in this case accepted the testimony of USSC in this regard and it proposed no adjustment to this expense item. Therefore, no basis existed to disbelieve this evidence. See *Johnson v. Painter, supra*. The Order’s determination that “[w]ithout price comparison data, the Commission has **no way** to determine whether ... Bio-Tech was providing sludge hauling service at a fair price” is simply incorrect. USSC provided data and information that demonstrated the rate that was charged for this service. [Composite Hearing Exhibit No. 8] This was further evidence of the market price testified to by Company witness Georgiev. The Commission therefore clearly had substantial evidence upon which it could have made the determination that these affiliate expenses were reasonable. Proof of this is in the fact that Commission has previously accepted less than this

quantum and type of evidence on this very point in the past, most recently in Docket No. 2007-244-W involving Southland Utilities, Inc. [Docket No. 2007-244-W, *Application of Southland Utilities, Inc.*, Hearing Exhibit 5, p. 42, l. 6 – p. 43, l. 2] in determining allowable expenses supporting an increase in water rates for that entity. The Commission's departure from this prior precedent is without evidentiary support and is arbitrary.⁴ See *Heater I* and *330 Concord Neighborhood Ass'n, supra*.

7. The Order concludes that the Company failed to address in its testimony an alleged DHEC notice of violation regarding an exceedance of lead levels in the Shandon subdivision during the period June through September, 2006. *Id.* at 15-16. This failure on the Company's part caused the Commission to "question what other DHEC violations might have occurred with the USSC systems that were not brought to the attention of the Commission" [Order at 15] and to conclude that USSC failed to meet its burden of proof. This part of the Order is erroneous for a variety of reasons. First, the letter from the Company to customer Fick relied upon by the Commission for this conclusion is not a notice of violation by USSC issued by DHEC. [Hearing Exhibit 2] To the contrary, it is only a notice required by DHEC to be sent to USSC's customers informing the customers that lead levels in their water exceeded a specified level during the period in question; the letter does not document any violation of a DHEC regulation by USSC. According to the testimony of customer Fick, attached to that letter was "a

⁴In questioning the Company witness, a Commissioner referenced an independent management audit report procured by ORS pertaining to USSC and certain of its affiliates. [Tr.p.183, l.20 - p.184, l. 18.] In addition to not being evidence of record in this case and objectionable as hearsay, this audit report existed at the time of the Southland case and formed the basis for a similar question to that company's witness by a Commissioner. [Docket No. 2007-244-W, *Application of Southland Utilities, Inc.*, Tr. p. 77, l. 8-9]

pamphlet dated 1998, telling **us** what **we** could do if **we** discovered lead in **our household water supply.**” [Tr.p.38, l.25 - p.39, l. 10 (emphasis supplied)]. Consistent with this statement is the language of the Consumer Confidence Report (CCR) contained in Hearing Exhibit 2, which states that the likely source of the lead in the water in the Shandon subdivision is corrosion from household plumbing or erosion of natural deposits. [Hearing Exhibit 2]. Thus, there has been no assertion, much less a determination, by DHEC that USSC committed any violation of DHEC rules. Second, even assuming that the letter did constitute a notice of violation of DHEC rules by the Company (which is disputed), the interpretation given S.C. Code Ann. RR 103-514.C and 103-714.C (Supp. 2007) in the Order is incorrect as a matter of law. As the Commission is aware, the Court of Common Pleas for the Fifth Judicial Circuit has previously reversed the Commission’s interpretation of these regulations as being applicable to all notices of violation of DHEC rules; rather, these regulations only apply to a notice of violation of DHEC rules where the violation affects service to customers and has been determined by DHEC to be a violation. *See Carolina Water Service, Inc. v. South Carolina Office of Regulatory Staff*, C /A No.05-CP-40-6133, November 28, 2006 at 27.⁵ Nothing in the testimony of customer Frick or Hearing Exhibit 2 reflects that her service was affected, i.e., interrupted. And, as noted above, there is no DHEC notice of violation, much less DHEC order, with respect to this matter. Third, the conclusion in the Order that “other DHEC violations might have occurred” and “additional DHEC violations ... might have gone unreported” is only speculation and therefore not substantial evidence which can support the Commission’s determination that USSC “failed to

⁵As the Commission is aware, an effort is underway to amend its regulations to require that DHEC **orders** pertaining to violations of DHEC regulations be reported to the Commission.

furnish necessary information and failed to meet its burden of proof.” *See S.C. Energy Users Committee v. PSC*, 332 S.C. 397, 505 S.E.2d 342 (1998), *citing S.C. Cable Television Ass’n v. PSC*, 313 S.C. 48, 437 S.E.2d 38 (1993). Fourth, the effect of this portion of the Order is to require that USSC affirmatively disprove that any DHEC violations have been noticed or committed. This is not only fundamentally inconsistent with the law regarding the burden of proof in enforcement proceedings [South Carolina Administrative Practice and Procedure, Lowell and Bates, SC Bar, 2004 at 200-201], it exceeds the Commission’s statutory authority.

8. The Order concludes that USSC failed to meet its burden of proof with respect to the proposed increase in its water distribution rate because (a) certain of USSC’s Anderson and York County water customers “are paying significantly more than their neighbors who are on various nearby municipal water systems”, (b) this testimony “raise[d] questions of fairness with regard to the price paid by distribution only customers of the Company”, and (c) USSC did not provide “[f]urther data on the Company’s cost of providing water to the distribution-only customers [which] should have been provided ... given the apparent disparity between the [distribution-only] rates presently charged by the Company ... as compared to the rates charged by the various adjoining municipal systems.” Order at 16-18. This portion of the Order is erroneous for a variety of reasons. Initially, USSC would note that the rates currently charged by the Company for water distribution only service were approved by the Commission in the Company’s last rate case. Accordingly, those rates are presumed correct as a matter of law. *Hamm v. S.C. Pub. Serv. Comm’n*, 315 S.C. 119, 432 S.E.2d 454 (1993). Nothing in the customer testimony overcame that presumption. Moreover, because the Commission is

See Notice of Drafting, December 12, 2007, Docket No. 2007-445-A.

obligated to set rates which provide USSC an opportunity to earn a fair return on **its** investment and to recover **its** expenses of operation (*See Porter, Bluefield, Hope Natural Gas, and Hamm v. PSC, supra*), comparisons of the Company's current rates with rates of other utilities are irrelevant and cannot form the basis for a decision in USSC's case. *See, e.g., Re: Bozrah Light & Power Co.*, 34 PUR3d 398 (1960) (Conn. PUC) ["Rates may not be prescribed on the basis of comparison with rates of other utilities since, in passing upon the reasonableness, the commission must evaluate the needs of each company upon its own merits."] *Cf. Heater of Seabrook, Inc. v. PSC*, 332 S.C. 20, 503 S.E.2d 739 (1998) (*Heater II*). And, even assuming that the Commission could properly compare rates of other utilities with those of the Company to determine the reasonableness of the Company's rates (which is disputed), it cannot do so without substantial evidence of record. The record in this case is devoid of any evidence that USSC and any of the "municipal" utilities referenced are comparable in any way; to the contrary, the only evidence of record on this point is that provided by Company witness Haas and it demonstrates clearly that USSC and these governmental utilities are not in the least comparable. [Tr.p.218, ll. 1-17.] Further, none of these governmental utilities are within the jurisdiction of the Commission, and therefore do not have their rates set under standards and employing methodologies utilized and observed by this Commission. Given the clear dissimilarities between USSC and these governmental utilities – and the complete lack of evidence of any similarity regarding the manner in which their rates are set – this portion of the Order is erroneous as a matter of law. *Heater II, supra*. Additionally, the conclusion that USSC was obligated to provide further data regarding the cost of its distribution only service is, again, an arbitrary departure from prior Commission precedent given the presumption that the Company's

existing rates are reasonable and that the percentage difference between the Company's regular water rates and distribution only rates previously approved by the Commission in Order No. 2006-22, Docket No. 2005-217-WS, is the exact same as that proposed in this proceeding – i.e., 42.7%. *See Heater I, 330 Concord, supra*. Also, this aspect of the Order is erroneous for the same reasons as set forth in paragraph 4(f), *supra*. Finally, this aspect of the Order is affected by an error of fact in speculating that “[i]t may be the case that the neighboring water system is providing distribution services to its customers at a deep discount.” *Id.* at 18. To the contrary, the evidence of record is that the governmental systems described in customer testimony charge USSC the same per thousand gallons bulk water rate that they charge to their own, retail customers. [Tr. p.218, l.29 - p.219, l.17.] Thus, rather than offering its retail customers a discount, it is clear that the governmental systems are overcharging USSC for bulk service. The fact that they are doing so and the Commission is powerless to address it does not form the basis for penalizing USSC.

9. The Order erroneously limits the scope of the due process protections to which USSC is entitled by ruling that USSC “had the opportunity to file responses to its customers’ testimony” and “to cross-examine witnesses.” [Order at 5-6]. While USSC may have been entitled to exercise some of the rights of a party in a contested case, the “complaining” customers were not required to adhere to the obligations of a party in a contested case. For example, no customer was required to provide written information sufficient to satisfy the requirements of a complaint under statute or Commission rules. *See, e.g.* S.C. Code Ann. § 58-5-270 (Supp. 2007) and 26 S.C. Code Ann. Regs. R. 103-825.A (2007). Nor were any of these customers subject to discovery by USSC with respect to any of the assertions made by customers in any of the public

hearings. (Cf. 26 S.C. Code Ann. Regs. RR. 103-833, 834 and 835 (2007)). And USSC was deprived of the mandatory statutory benefit of having customer complaints mediated by ORS under §58-5-270. The disparity in the process afforded USSC is amplified by the Order, which effectively equates customer “complaints” at “evening public hearings” with the written complaints customers are entitled to make under Commission rules and statute. *Id.* at 6.⁶ The Order subjects USSC to an extra-statutory complaint process that relieves complaining customers of the obligations arising under, and denies USSC procedural and substantive rights and benefits to which it would be entitled within, the framework of the statutory and regulatory complaint process. This is clearly a violation of due process. “The requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review.” *Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision)*, 332 S.C. 551, 562 505 S.E.2d 598, 603 (Ct. App. 1998). The Commission failed to put USSC on notice that customers would be allowed to present complaints against USSC and, therefore, denied USSC the opportunity to protect its interests to the extent permitted by law and regulation. Even if such notice had been provided, allowing customers to circumvent the established method of resolving complaints exceeds the powers conferred upon the Commission by the South Carolina General Assembly. “A state administrative agency...can only exercise those powers which have been conferred upon it”. *Triska v. Dept. of Health and Env. Control*, 292 S.C. 190, 191 355 S.E.2d 531, 533 (1987). The Order fails to cite any statutory or regulatory basis which allows customers to raise complaints

⁶“Furthermore, nothing in the Commission’s statutory authority or the regulations governing the Commission that allow for customer complaints indicates that the customer complaint-filing process is the exclusive vehicle for raising issues regarding a company’s quality of service.”

outside of the procedures delineated in the Commission's regulations; rather, it unilaterally expands the scope of the complaint process in contravention of the legislature's plain and unambiguous intent and the Commission's own rules and procedures. "Any action taken by [a state administrative agency] outside of its statutory and regulatory authority is null and void." *Id.*

10. As described hereinbelow, the Order misinterprets and misapplies the caselaw and other authority cited by USSC in support of its objection to the Commission's receipt and reliance upon unsubstantiated customer complaint testimony, departs from prior Commission interpretations of pertinent caselaw, ignores other applicable decisions of the Supreme Court (including one previously recognized by the Commission to be binding upon it), misstates the nature of USSC's objection, improperly relies upon the appellate standard of review of Commission determinations in treating the substantive law applicable to USSC's objections, improperly concludes that "public testimony" may be used to ferret out potential quality of service issues for inquiry by the Commission, and improperly holds that determinations regarding customer testimony pertaining to rate design and uniform rates do not have to be supported by substantial evidence of record. As a result, the Commission's overruling of USSC's objection is improper.

(a) Contrary to the Order, *Patton* does not speak to whether "quality of service" is a proper consideration "in arriving at just and reasonable rates". *Id.* at 6. Rather, *Patton* holds only that, in supervising and regulating the **service** of a public utility under S.C. Code Ann. § 58-5-210, the Commission may impose "reasonable requirements on its jurisdictional utilities to insure that adequate and proper **service** will be rendered to customers" and that the withholding of an otherwise allowable increase in rates until a utility makes upgrades to facilities to meet DHEC standards is a proper means by which the Commission may discharge its authority to regulate and supervise the service provided. Moreover, *Patton* sanctioned the Commission's action – which, again, was

simply to withhold rate relief in one of eight subdivisions served by the utility until upgrades to the plant serving that subdivision were made – in view of not simply testimony by customers of the utility in that subdivision, but also the separate testimony by DHEC personnel that the utility’s plant serving that subdivision did not meet DHEC standards. 312 S.E. 2d at 260. Thus, in *Patton* (1) customer complaints alone were not held to be sufficient to support the denial of rate relief, (2) objective testimony from a DHEC witness that the utility’s facility in that subdivision failed to meet DHEC standards was provided, and (3) only a delay in the availability of otherwise allowable rate relief for service to customers until required system upgrades in one subdivision were made was the result. By contrast, the Order does not cite to any DHEC standard which the Company’s facilities do not meet, does not identify any subdivision or customer whose service was affected by substandard facilities, and does not limit the nature of Commission action to addressing the shortfalls of the Company’s service and facilities with respect to such standards. Rather, the Order denies USSC rate relief in all of its eighty two subdivisions based simply on the unsubstantiated testimony of customers in only four subdivisions. Thus, in addition to misinterpreting and misapplying *Patton*, the Order is not supported by substantial evidence of record in this regard and also fails to comport with S.C. Code Ann. §1-23-350 (2005).

(b) Moreover, the analysis of *Patton* in the Order fails to adhere to the Commission’s own prior interpretation of that case and fails to recognize a subsequent decision of the Supreme Court which the Commission recognized as being binding upon it in the another rate case. In Order No. 2005-328, Docket No. 2004-357-W/S, June 22, 2005, the Commission cited *Patton* for the proposition that the quality of service rendered by Carolina Water Service, Inc. was, for purposes of determining just and reasonable rates, determined by reference to its **adequacy**. *Id.* at 3. By contrast, the Order makes no finding that the Company’s service was not adequate. *Cf.*, *Able Communications, Inc. V. S.C. Public Service Comm’n.*, 290 S.C. 409, 351 S.E.2d 151 (1986) (precluding the Commission from making implicit findings of fact.) Furthermore, in the same order the Commission also recognized that the *Heater Memo. Op.* precluded it from denying rate relief based upon customer testimony complaining of the quality of service in the absence of scientific criteria and objective, quantifiable data regarding quality of service. Order No. 2005-328 at 57. In the instant case, there is no quantifiable, objective data or scientific criteria data in the record which supports a finding that USSC’s service is not adequate. To the contrary, the only such evidence of record is that provided by ORS’s testimony describing the results of its compliance audit, which was that the Company provides adequate service. The Commission’s departure from its prior precedent in this regard is arbitrary and, thus, improper. *Heater I*, 330 *Concord Neighborhood Ass’n*, *supra*.

(c) The Order improperly interprets, and fails to give effect to, the circuit court’s order in *Tega Cay Water Service, Inc. v. PSC*, *supra*. This circuit court order does not “restrict[] the *Patton* holding by maintaining that customer testimony related to poor

quality of service, if not corroborated by other substantial evidence in record, fails to support a Commission order giving an insufficient rate of return.” Order at 8. To the contrary, this circuit court order specifically cites the Supreme Court’s decision in the *Heater Memo. Op., supra*, as its primary basis for rejecting the Commission’s reliance upon “unsubstantiated customer complaints in the face of the Commission Staff’s own study showing that the quality of water service was acceptable.” [Circuit Court Order at 7-8]. *Patton* was cited in the circuit court order as only supporting authority for the conclusion reached by the circuit court based upon the *Heater Memo. Op.* [Circuit Court Order at 9.] The Order therefore fails to address the substance of USSC’s objection regarding reliance upon unsubstantiated “customer complaints.”

(d) The Order misinterprets USSC’s objection⁷, which has two components. First, USSC objected to customer testimony which raises complaint issues outside the statutory and regulatory process on the due process and statutory grounds described in paragraph 7 hereinabove. Second, USSC objected to the Commission’s receipt **and reliance** upon customer complaint testimony regarding “quality of service” which is not supported by non-testimonial, scientific criteria and objective, quantifiable data that would demonstrate that USSC’s service is not adequate. USSC’s objection in this regard is not based on an assertion that customer testimony is always unsubstantiated. However, USSC does assert that customer testimony is objectionable when it is not substantiated in the manner required under the *Heater Memo. Op.* and the circuit court order in Tega Cay Water Service and consistent with *Patton*. Clearly, these cases stand for the proposition or support the conclusion that customer complaints regarding quality of service, without more, are not substantiated to the point that they may constitute substantial evidence of inadequate service that justifies complete denial of rate relief – particularly when viewed in the light of the ORS conclusion that USSC does provide adequate service.

(e) The Order improperly concludes that the merit of USSC’s objection should be determined by reference to the standard of review binding upon a court which reviews Commission orders. [*Id.* at 9-10.] The standard of review is irrelevant to the substantive legal requirements for determining the adequacy of a utility’s service in reliance upon customer testimony set out in the *Heater Memo. Op.*, and the circuit court order in Tega Cay Water Service, Inc. and given effect in *Patton*.

⁷ “[T]he Commission does not agree with USSC’s apparent argument that these cases stand for the proposition that the Commission is not entitled to consider the testimony and evaluate the credibility of public witnesses in the ratemaking process. USSC essentially argues that the testimony of public witnesses is ‘unsubstantiated’ and therefore may not be considered.” Order at 10.

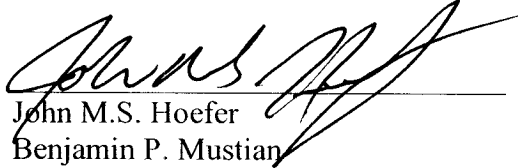
11. The portion of the Order containing “General Discussion” is affected by errors of law and fact (in addition to those described above). For example, the reference to *Seabrook Island Prop. Owners Ass’n. v. PSC*, 303 S.C. 493, 401 S.E.2d 672 (1991) [Order at 19] is inapt since USSC is not regulated on an operating margin basis and did not seek to have its rates set on an operating margin basis in this case. Additionally, the conclusion that USSC’s “failure to meet its burden of proof in this case makes it impossible for [the] Commission to determine whether or not the proposed rates ...are just and reasonable” [*Id.*] is patently incorrect given the unsubstantiated, *de minimis* customer testimony and the holdings of the Supreme Court in the *Heater Memo. Op.*, *Patton*, and the other cases cited herein detailing the requirement for substantial evidence in this case.⁸ Finally, because the Commission refused to allow USSC its additional operating expenses and plant investments, the return on rate base and operating margins recited in the Order are incorrect. The effect of the Commission’s order is to allow USSC a return on rate base of only 2.58% and an operating margin of only (4.13%) – both of which are confiscatory and unconstitutionally inadequate as a matter of law. *See Hope, Bluefield, Hamm and Tega Cay Water Service, supra.*

WHEREFORE, having set forth the proper grounds, USSC requests that the Commission issue an order: (a) granting this petition for rehearing or reconsideration; (b) modifying the

⁸Likewise, the Commission’s own precedents referenced hereinabove establish the invalidity of this conclusion and make arbitrary the Commission’s departure from same.

findings, conclusions, and decisions in the Order in accordance herewith, and (c) granting CWS such other and further relief as is just and proper.⁹

Respectfully submitted,



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Attorneys for Utilities Services of South
Carolina, Inc.

Columbia, South Carolina
This 3rd day of March, 2008

⁹By separate motion of even date, USSC is seeking approval for a bond to place rates into effect pending this petition and any subsequent appeal in accordance with S.C. Code Ann. §58-5-240 (D) (Supp. 2007).

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA

DOCKET NO. 2007-286-WS


IN RE:

Application of Utilities Services of
South Carolina, Inc. for adjustment of
rates and charges and modifications to
certain terms and conditions for the
provision of water and sewer service.

CERTIFICATE OF SERVICE

This is to certify that I have caused to be served this day one (1) copy of Utilities Services of South Carolina, Inc.'s **Petition for Rehearing or Reconsideration** by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

Jeffrey M. Nelson, Esquire
Office of Regulatory Staff
Post Office Box 11263
Columbia, South Carolina 29211



Kristina W. Kusa

Columbia, South Carolina
This 3rd day of March, 2008.

RECEIVED
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SC PUBLIC SERVICE
COMMISSION